92-1821

Supreme Court, U.S.
FILED
MAY 14 1993

NO.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1992**

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LOUIS R. KOERNER, JR.,
MOVANT, APPELLANT, PETITIONER

VERSUS

INTERNATIONAL COFFEE CORPORATION
AND
CARLOS L. NOTTEBOHM
DEFENDANTS, APPELLEES, RESPONDENTS

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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60 pp

## QUESTIONS PRESENTED FOR REVIEW

May a court of appeal, in the interest of judicial economy, review a judgment deciding both the merits of the case as well as an interlocutory order holding a party liable for attorney's fees under Rule 11, but not quantifying the amount of those fees?

May a district court levy sanctions against a party's attorney after the parties have settled their dispute and agreed not to pursue each other for attorney's fees?

May a district court refuse to determine whether a person's liability to a party for sanctions is reduced by that party's settlement and receipt of money from another party also liable for the same sanctions?

## PARTIES TO THIS PROCEEDING

**Petitioner/Counsel for plaintiff:**

Louis R. Koerner, Jr.

**Respondents/Defendants:**

International Coffee Corporation
Carlos L. Nottebohm

**Plaintiff:**

Old Time Enterprises, Inc.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iv

REFERENCES TO DECISIONS BELOW . . . . . vi

GROUNDS FOR JURISDICTION . . . . . vii

STATUTE INVOLVED . . . . . viii

STATEMENT OF THE CASE . . . . . 1

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI . . . . . 4

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO AFFIRM THE DISTRICT COURT'S DECISION TO AWARD UNQUANTIFIED SANCTIONS . . . . . 5

A. Circuits which have expanded their statutory jurisdiction . . . . . 7

B. Circuits remaining within statutory jurisdictional limits . . . 12

II. EFFECT OF SETTLEMENT ON JUDGMENT SANCTIONING COUNSEL FOR A SETTLING PARTY . . . . . 15

CONCLUSION . . . . . 20

## TABLE OF AUTHORITIES

Cases

*Andrews v. Employees' Retirement Plan of First Alabama Bancshares, Inc.*, 938 F.2d 1245 (11th Cir. 1991). . . . . 11, 12

*Becton Dickinson & Co. v. District 65, United Automobile, Aerospace & Agricultural Implement Workers*, 799 F.2d 57 (3d Cir. 1986). . . . . 12

*Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984). . . . . 10, 11, 14

*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). . . . . 5

*Herschinow v. Bonamarte*, 735 F.2d 264 (7th Cir. 1984). . . . . 10, 14

*Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). . . . . 5

*McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068 (5th Cir. 1992). . . . . 18

*Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985). . . . . 9, 10, 14

*Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977). . . . . 12

*Old Time Enterprises, Inc. v. International Coffee Corp.*, No. 89-3763, slip op. (5th Cir. July 12, 1990) (per curium). . 7

*Pennsylvania v. Flaherty*, 983 F.2d 1267 (3d Cir. 1993). . . . . 2, 12, 13

*Perkins v. General Motors Corporation*, 965 F.2d 597 (8th Cir. 1992). . . . . 17

*Phelps v. Washburn University*, 807 F.2d 153 (10th Cir. 1986). . . . . 14

*Riverhead Savings Bank v. National Mortgage Equity Corporation*, 893 F.2d 1109 (9th Cir. 1990). . . . . 16

*Southern Travel Club, Inc. v. Carnival Air Lines, Inc.*, 986 F.2d 125 (5th Cir. 1993). . . . . 6, 13

*Stewart v. Baldwin County Board of Education*, 908 F.2d 1499 (11th Cir. 1990). . . . . 12

*Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, (7th Cir. 1984). . . . . 10

*Williams v. Fab-Con*, No. 92-3320, slip op. (5th Cir. May 6, 1993). . . . . 18

Statutes, articles and rules

28 U.S.C. § 1254(1). . . . . vii

28 U.S.C. § 1291. . . . . viii, 5, 10, 12

28 U.S.C. § 2101(c). . . . . vii

Federal Rule of Civil Procedure 11. . . . . 7, 20

## REFERENCES TO DECISIONS BELOW

**TRIAL COURT:**

*Old Time Enterprises, Inc. v. International Coffee Corp.*, (No. 89-1371, United States District Court, Eastern District of Louisiana, judgment rendered August 18, 1989). Unreported.

*Old Time Enterprises, Inc. v. International Coffee Corp.*, (No. 89-1371, United States District Court, Eastern District of Louisiana, order and reasons rendered October 25, 1989). Unreported.

*Old Time Enterprises, Inc. v. International Coffee Corp.*, (No. 89-1371, United States District Court, Eastern District of Louisiana, minute entry of September 10, 1991). Unreported.

**APPELLATE COURT:**

*Old Time Enterprises, Inc. v. Browning*, (No. 89-3763, United States Court of Appeals for the Fifth Circuit, district court judgment affirmed on July 12, 1990). Unreported.

*Old Time Enterprises, Inc. v. Browning*, (No. 91-3870, United States Court of Appeals for the Fifth Circuit, district court judgment affirmed on January 5, 1993). Unreported.

## GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on January 5, 1993 and denied the application for rehearing on February 16, 1993.

## STATUTE INVOLVED

28 U.S.C. § 1291:

Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## STATEMENT OF THE CASE

On March 28, 1989, Louis R. Koerner, Jr., petitioner and attorney of record for Old Time Enterprises, Inc. ("Old Time"), filed a petition in the United States District Court for the Eastern District of Louisiana on behalf of Old Time against International Coffee Corporation, Inc. ("ICC") and others. The petition alleged RICO violations and invoked the court's federal question jurisdiction. On August 18, 1989, the district court dismissed the petition and imposed sanctions under Rule 11, Fed. R. Civ. P., against Old Time "for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order." Neither the judgment nor the order and reasons accompanying the judgment quantified the amount of attorney's fees. In fact, the court stated that it would fix the amount of sanctions after a contradictory hearing on motion of defendants. On October 25, 1989, the trial court denied Old Time's motions to amend the petition and to reconsider the dismissal with sanctions. At that time, the trial court also

dismissed Nottebohm's motion for a protective order and additional sanctions as moot.

On October 30, 1989, Old Time filed its notice of appeal. On November 14, 1989, Koerner amended the notice of appeal to include himself as an appellant, out of an abundance of caution, even though no judgment had been rendered against him and he was not a party to the litigation. The United States Court of Appeals for the Fifth Circuit affirmed both aspects of the district court's decision, *i. e.*, the dismissal on the merits and the imposition of Rule 11 sanctions on July 12, 1990. In its *per curium* opinion, the court did not address the issue of whether it had jurisdiction to consider the interlocutory decision to assess an unspecified amount of attorney's fees against Koerner.[1]

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[1]Although neither party contested jurisdiction on appeal, the Fifth Circuit could have raised the issue *sua sponte*. Pennsylvania v. Flaherty, 983 F.2d 1267, 1275 (3d Cir. 1993).

Meanwhile, Old Time, ICC, and the individual parties settled their differences; ICC dropped its pursuit of attorney's fees from Old Time and the president of Old Time, Jack Bolanos, but reserved the right to seek sanctions from Koerner. The district court approved that settlement on January 9, 1991, over the objection of Koerner who argued that he was entitled to attorney's fees based on his contingency fee contract with his clients. At an evidentiary hearing to fix the amount of the sanctions, Koerner objected to the imposition of sanctions against himself on the grounds that the judgment declaring that sanctions would be awarded named Old Time as the only party responsible for the sanctions. Koerner also argued that he was entitled to a credit or pro rata reduction based on Old Time's payment to ICC to settle their differences, including the sanction award. On September 10, 1991, the district court levied $25,000.00 in attorney's fees against Koerner, to be divided equally between ICC and Carlos L. Nottebohm. The Fifth Circuit affirmed this decision on January 5, 1993 and

denied Koerner's application for rehearing on February 16, 1993.

## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A writ of certiorari should be granted in this case for the following reasons:

(1) This decision is in conflict with other decisions of various federal circuit courts of appeal on the same matter.

(2) The Fifth Circuit departed from accepted and usual course of judicial proceedings and sanctioned such a departure by the district court.

(3) This decision represents an important question of federal law which has not been, but should be decided by this Court.

## I. THE FIFTH CIRCUIT LACKED JURISDICTION TO AFFIRM THE DISTRICT COURT'S DECISION TO AWARD UNQUANTIFIED SANCTIONS

The appellate jurisdiction of the Fifth Circuit in the instant case rested on 28 U.S.C. § 1291, which requires that a decision be final before an appellate court reviews that decision. A decision is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). Conversely, a decision is not final within the meaning of 28 U.S.C. § 1291 if it simply determines liability, but reserves the assessment of damages for a later date. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). It would seem beyond dispute that the portion of a judgment awarding sanctions, but deferring the computation of those sanctions, is unappealable, even if it is coupled with a final decision on the merits. It should then follow that an appellate court decision affirming such an order

is without effect, because the appellate court had no jurisdiction to consider the order in the first place.

Despite the seeming inescapability of this conclusion, the circuits are split on the issue of whether they may exercise jurisdiction over an appeal which contests both the merits of the case and an unquantified award of attorney's fees. Some, in the name of judicial economy, have carved an exception to the rule requiring a final judgment and held that the interlocutory order granting attorney's fees may be reviewed on appeal if it is consolidated with an otherwise appealable, final judgment on the merits of the case. Other circuits have declined to create a judicial exception which would extend their statutory jurisdiction to include unappealable issues. The Fifth Circuit has rendered decisions in both directions. In the instant case, which involved both the merits and sanctions issues, it reviewed both the merits and the liability issue of attorney's fees although the damages issue had not been determined. In *Southern Travel Club, Inc. v. Carnival Air Lines, Inc.*, 986

F.2d 125 (5th Cir. 1993), the Fifth Circuit reviewed the merits of a district court judgment, but refused to review an order granting a motion for unspecified sanctions.

**A. Circuits which have expanded their statutory jurisdiction:**

**Fifth Circuit**

As noted above, the Fifth Circuit in the instant case affirmed the district court's judgment which awarded, but did not quantify, attorney's fees under Rule 11, Fed. R. Civ. P. *Old Time Enterprises, Inc. v. International Coffee Corp.*, No. 89-3763, slip op. (5th Cir. July 12, 1990) (per curium). The court did not even address whether it had jurisdiction to consider the issue of liability for attorney's fees separate from the damages issue. It is possible that the court was unconscious of the existence and implications of that silent issue. Nevertheless, because the issue is jurisdictional, it must now be considered.

If this Honorable Court should find that the Fifth Circuit improperly considered the issue of liability for attorney's fees, then that portion of the affirmance should be vacated as null and void. Because the parties settled their dispute and dispensed with the entire law suit before a final judgment existed as to attorney's fees, no sanctions should have been imposed. On the other hand, if this Honorable Court should determine that the Fifth Circuit properly consolidated an unappealable issue of attorney's fees with the final, appealable issue on the merits, then the Fifth Circuit's affirmance became the law of the case and binding on the district court. Because the judgment affirmed by the Fifth Circuit assigned liability specifically to Old Time, without mentioning its counsel, Louis R. Koerner, Jr., the district court was not at liberty to ignore the Fifth Circuit's affirmance of attorney's fees against Old Time.

**Sixth Circuit**

In *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985), the court was faced with several issues regarding appellate jurisdiction. As in the instant case, the district court simultaneously dismissed the plaintiff's petition and held that the defendant was entitled to costs and attorney's fees. The court then allowed the defendant thirty days to submit an itemization of its costs and fees. Realizing that the holding of liability for attorney's fees was not a final judgment, the plaintiff waited to file his notice of appeal until the district court awarded damages. In doing so, the Sixth Circuit held that the plaintiff lost his right to appeal the merits of the case because he filed his notice of appeal late. Moreover, the court noted that the plaintiff could have consolidated an appeal from the determination of liability for attorney's fees with the appeal from the merits. The court reasoned, "[T]he court's jurisdiction over the appeal on the merits carries with it the authority to determine the liability for fees." *Morgan*, 757

F.2d at 796 (citing *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 826-27 (7th Cir. 1984); *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984); *Herschinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984)).

**Seventh Circuit**

As the Sixth Circuit indicated in *Morgan*, the Seventh Circuit decisions provide fertile ground for the growth of appellate jurisdiction under 28 U.S.C. § 1291. In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984), the court justified its exercise of jurisdiction over an otherwise unappealable order "in the interest of orderly judicial administration". *Id.* at 826. The court's primary goal in resolving the issue was to avoid multiple appeals. The court acknowledged the possibility that there may be another appeal after it reviewed the liability issue. However, it noted that even if it waited, it might have to decide two fee appeals--first, the quantum for the work in the district court, and later, the quantum for the work in the appellate court. Therefore, the

court opted for deciding the liability issue and, if affirmed, pointed out that the district court could then make a single award covering both the district court and the court of appeals proceedings. At that point, the appellant could appeal the single quantum of attorney's fees. Ultimately, the court made the following admission:

> The sad fact is that there is no sure way of preventing multiple appeals in a case where the prevailing party has rights under an attorney's fee statute as well as substantive rights. There would be no net judicial economy, but if anything a net diseconomy, if we held that we could not consider the merits of the fee order until the amount of fees to be awarded is fixed. We think we can.

*Id.* at 827.

**Eleventh Circuit**

The Eleventh Circuit followed the lead of the Sixth and Seventh Circuits in *Andrews v. Employees' Retirement Plan of First Alabama Bancshares, Inc.*, 938 F.2d 1245 (11th Cir. 1991). The court relied on the general principle that the appellate court has jurisdiction to review a non-appealable

aspect of a district court order when that order is otherwise properly before the court. *Id.* at 1247-48 (citing *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1509 (11th Cir. 1990); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977)).

**B. Circuits remaining within statutory jurisdictional limits:**

**Third Circuit**

The Third Circuit recently reaffirmed its position that it is not at liberty to carve out an exception to the rule that appellate courts must review only final judgments under 28 U.S.C. § 1291 in *Pennsylvania v. Flaherty*, 983 F.2d 1267, 1276-77 (3d Cir. 1993). In that case, the court reviewed the various circuit court decisions and their rationales, and declined to adopt a liberal view of any exception to the general rule. Relying on its response to the judicial economy argument made in an earlier decision, *Becton Dickinson & Co. v.*

*District 65, United Automobile, Aerospace & Agricultural Implement Workers*, 799 F.2d 57 (3d Cir. 1986), the court reiterated:

> In the interest of our concern for judicial economy, we concluded that deciding the merits of the attorney's fee issue would not preclude the likelihood of a second appeal on the actual amount awarded after the fee determination, and held that "the jurisdictional rules precluding review of non-final orders [is] ... firmly entrenched."

*Flaherty*, 983 F.2d at 1277 (quoting *Becton*, 799 F.2d at 61-62.)

**Fifth Circuit**

Unlike the court's action in the instant case, in *Southern Travel Club v. Carnival Air Lines*, 986 F.2d 125 (5th Cir. 1993), the Fifth Circuit carefully considered its jurisdictional limits over non-final orders, weighed the arguments, and concluded that it had no jurisdiction to review an order granting an unspecified amount of attorney's fees. In that opinion, the court analyzed the Seventh Circuit's justification

in *Bittner*, but rejected it for two reasons. First, it held that jurisdictional rules of review are "firmly entrenched". Second, the court noted that the exception had the potential to generate confusion among parties as to when the appellate timetable begins to run to file a notice of appeal on an order awarding sanctions. This concern is well-founded, as was demonstrated by the Sixth Circuit's rule that resulted in such confusion in *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985) (discussed *supra*) and deprived the appellant of his right to appeal the decision on the merits of his case.

**Tenth Circuit**

In *Phelps v. Washburn University*, 807 F.2d 153 (10th Cir. 1986), the court specifically declined to follow the Seventh Circuit's decision of *Bittner* as well as that circuit's decision in another case to hold its decision until the district court set the amount of the fee award. *See Herschinow v. Bonamarte*, 735 F.2d 264, 267 (7th Cir. 1984). The Tenth Circuit recognized that its appellate jurisdiction was not



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discretionary, and therefore, it was incapable of creating an exception which would expand that authority.

## II. EFFECT OF SETTLEMENT ON JUDGMENT SANCTIONING COUNSEL FOR A SETTLING PARTY

Few cases exist in which the district court imposed sanctions on the attorney for one of the parties settling their dispute with another party. In addition to the instant case, two other circuits have faced this issue and reached opposite conclusions. In the case before this Court, the Fifth Circuit rejected Koerner's argument that he was not liable for attorney's fees once the parties had completely settled the underlying cause of action. Instead, the court held that Koerner was bound by the district court's decision and the settlement in which ICC and Nottebohm reserved their rights against Koerner. This decision contrasts starkly with the district court's earlier holding that Koerner did not have standing to challenge the settlement or receive a credit for the work which he performed under a contingency fee contract as



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a set off against any attorney's fees owed. The lower courts also refused to credit Koerner for the money and other consideration received by ICC from its settlement with Old Time.

In *Riverhead Savings Bank v. National Mortgage Equity Corporation*, 893 F.2d 1109 (9th Cir. 1990), the court held that the appeal of the sanctions issue was moot where the party owing the monetary sanction settled with the party entitled to receive that money. The court distinguished its facts from the situation where attorney's fees are payable directly to the clerk of court pursuant to the court's inherent powers and not subject to revocation by the parties. The Ninth Circuit's position possesses the laudable effect of promoting post-judgment settlement by assuring parties and their attorneys that a settlement will have the effect of concluding all issues, collateral and otherwise, of the litigation.

In contrast, the Eight Circuit has affirmed a district court's decision to enforce sanctions against a party and her

attorney after that party had settled with the opposing party. *Perkins v. General Motors Corporation*, 965 F.2d 597 (8th Cir. 1992). There, the appellate court refused to vacate a district court order imposing non-monetary sanctions, despite an agreement by the defendant not to collect monetary sanctions. The Eighth Circuit's unwillingness to recognize parties' terms of settlement will have a chilling effect on settlement negotiations. Under this approach, sanctioned parties have far less incentive to settle their disputes once a sanctions order has been entered because they know that even if they bargain with the opposing party to forego the sanctions, they may still be liable for them based on the whim on the district court. This Honorable Court should grant a writ to consider this issue and remind the lower courts of the general federal policy of promoting settlement whenever possible.

Moreover, this Court should grant a writ because the Fifth Circuit departed from its own precedent and general federal common law which requires trial courts to determine

whether liability to a party is reduced by its settlement with another party. *See McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1079 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3653 (U.S. Mar. 12, 1993 (No. 92-1479); *Williams v. Fab-Con*, No. 92-3320, slip op. at 10-11 (5th Cir. May 6, 1993) and the cases cited therein. In *McDermott*, the Fifth Circuit held that the party receiving a monetary settlement carries the burden of proof to show that it is not receiving a double recovery if liability is later imposed on another party (or even non-party, as in the instant case.) Where that party cannot demonstrate that the settlement amount paid represents a separate obligation from the amount sought from the non-settling party, then the non-settling party is entitled to a credit for the amount of the settlement.

In the instant case, ICC received some $60,000.00 from Old Time in full satisfaction of its claims on open account and unquantified sanctions judgment against Old Time, as well as a release from Old Time of its bankruptcy preference litigation.



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The settlement did not allocate particular amounts between the open account claims owed solely by Old Time and the sanctions judgment owed initially by Old Time, and later, by Koerner. Without making such a distinction, ICC cannot carry its burden of showing that the proceeds of the settlement were not for the sanctions. Therefore, Koerner is entitled to a dollar-for-dollar credit against his judgment.

Finally, this issue represents an important question of federal law which has not been, but should be decided by this Court. With the increasing of use of sanctions by lower courts against attorneys, the scenerio in the instant case is likely to be played out in future cases. Parties, fearing the wrath of a trial court which has indicated that it will impose sanctions, will settle with their opponents and leave their attorney holding the bag. Attorneys are entitled to the same protection as other persons who are cast in judgment after other persons have settled out of court. That is, they are entitled to reduce their liability either by the amount of the settlement or by the pro



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rata share of the settling party. The lower courts in the instant case did not even consider the equities of this argument, much less give Koerner the credit which he deserved under federal law. Therefore, this Court should review .his issue and instruct the lower courts accordingly.

## CONCLUSION

This case raises two important issues relating to Rule 11 of the Federal Rules of Civil Procedure on which the federal appellate courts diverge drastically. This Honorable Court has never addressed either issue, and a writ should be granted to allow this Court to resolve the issues and provide guidance to the lower federal courts.

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